



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 441 OF 2008**

**NEW KENYA CO-OPERATIVE CREAMERIES LTD .....  
 PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....1<sup>ST</sup>  
 DEFENDANT**

**GODKA ENTERPRISES .....2<sup>ND</sup>  
 DEFENDANT**

**TOTAL KENYA LIMITED .....3<sup>RD</sup>  
 DEFENDANT**

**RULING**

The 3<sup>rd</sup> Defendant’s application dated 18<sup>th</sup> August 2011 is brought under Order 17 rule 2 (1) and(3) and Order 51 (1) of the revised Civil Procedure Rules, as well as section 3A of the Civil Procedure Act, and is seeking dismissal of the Plaintiff’s suit for want of prosecution. The grounds for the application are that no application has been made or step taken by the Plaintiff for a period exceeding one (1) year, and that it is apparent that the Plaintiff is no longer interested in this suit and the same only remains as an unnecessary burden to the 3<sup>rd</sup> Defendant.

Both the 3<sup>rd</sup> Defendant’s Advocate in her Supporting Affidavit sworn on 18<sup>th</sup> August 2011, and the Plaintiff’s Advocate in his Replying Affidavit sworn on 25<sup>th</sup> November 2011, have given detailed accounts of the steps taken by the respective parties since the filing of the suit herein on 11<sup>th</sup> September 2008 by way of Plaint. The Advocates also reiterated their respective arguments at the hearing of the application on 28<sup>th</sup> February 2012.

I have read and carefully considered the pleadings and submissions made by the parties to this application. Both Parties agree that the last step taken in the suit was by the Plaintiff on 28<sup>th</sup> June, 2011, when the Plaintiffs Advocates filed a notice of withdrawal of their application dated 11<sup>th</sup> September 2008. The 3<sup>rd</sup> Defendant argues that this does not qualify as a step in the proceedings, and that it is clear

that the Plaintiff is no longer interested in pursuing this suit as demonstrated by his failure to take my step to set down the suit for hearing.

The Plaintiff on the other hand argues that the 3<sup>rd</sup> Defendant's application is premature, misconceived, incompetent and an abuse of the court process, since one year has not lapsed since the Notice of Withdrawal dated 28<sup>th</sup> June, 2011 was filed and served upon the parties including the 3<sup>rd</sup> Defendant. Further, that the 3<sup>rd</sup> Defendant acknowledged receipt by stamping the Plaintiff's copy on 5<sup>th</sup> July, 2011, and the Plaintiff has annexed as evidence a copy of the said Notice of Withdrawal containing the 3<sup>rd</sup> Defendants Advocates stamp. The Plaintiff's Advocate avers that the Plaintiff's application dated 11<sup>th</sup> September, 2007 was withdrawn as it had been overtaken by events, and to pave way for hearing of the main suit.

The main issue to be decided is whether the filing and serving of a Notice of Withdrawal is a step taken within the meaning of Order 17 rule 2 of the Civil Procedure Rules. The step envisaged in the Civil Procedure Rules is a step taken on the record, as was held in **Victory Construction v Duggal (1962) EA 697**. The filing of the Notice of Withdrawal is clearly reflected on the court record having been entered on 30<sup>th</sup> June 2011, and the same was indeed filed on the same date. The said filing therefore suffices as a step for purposes of Order 17 Rule 2 of the Civil Procedure Rules. It is therefore the finding of this court that the test of one year delay under order 17 Rule 2(1) of the Civil Procedure Rules has not been met, and the 3<sup>rd</sup> Defendants application dated 18<sup>th</sup> August 2011 fails for this reason. The Plaintiff shall however set this suit down for hearing within 90 days of the date of this Ruling.

The costs of the application shall be borne by the 3<sup>rd</sup> Defendant.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_25<sup>th</sup>\_\_\_\_ day of \_\_\_\_April\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**